TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 708

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CREDIT ALLIANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1941
CERTIORARI GRANTED NOVEMBER 24, 1941

SUPREME COURT OF THE UNITED STATES

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CREDIT ALLIANCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 100561

CREDIT ALLIANCE CORPORATION, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Petitioner—Dean Acheson, Esq.; Jack J. Levinson, Esq.; W. Graham Claytor, Jr., Esq.; Newell W. Ellison, Esq. For Respondent: Joe D. Hughes, Esq.

Docket entries

1939

Nov. 6—Petition received and filed. Taxpayer notified. (Fee paid.)

Nov. 6—Copy of petition served on General Counsel.

Nov. 6—Request for hearing in Washington, D. C., filed by taxpayer. 11/6/39 copy served.

Dec. 9—Answer filed by General Counsel.

Dec. 12—Copy of answer served on taxpayer—Washington, D. C. Calendar.

1940

Apr. 9—Hearing set May 16, 1940.

May 16—Hearing had before Mr. Disney on merits. Consolidated for hearing with #100560. Stipulation of facts and appearance of W. Graham Claytor, Jr., filed. Briefs due in 45 days—replies in 15 days.

May 23—Brief filed by taxpayer.

May 27—Transcript of hearing 5/16/40 filed.

July 19—Motion for leave to file brief filed by General Counsel. 7/19/40 granted.

July 19—Brief filed by General Counsel.

July 22—Copy of brief served on General Counsel.

Oct. 22—Findings of fact and opinion rendered—Mr. Disney. Decision will be entered for petitioner.

Oct. 25—Decision entered—R. L. Disney, Division 4.

1941

Jan. 17—Petition for review by U. S. Circuit Court of Appeals, Fourth Circuit, with assignments of error filed by General Counsel.

Jan. 23—Proof of service filed by General Counsel (taxpayer).

Jan. 23—Proof of service of petition for review filed (counsel).

Feb. 17—Motion for extension to April 17, 1941, to complete and transmit record filed by General Counsel.

Feb. 17—Order enlarging time to April 17, 1941, to complete and transmit record, entered.
Apr. 9—Notice of appearance of Newell W. Ellison as counsel filed.
Apr. 10—Statement of points filed with proof of service thereon.
Apr. 10—Agreed designation of portions of record, proceedings, and evidence to be contained in the record filed. Proof of service thereon.

2 Before United States Board of Tax Appeals

Docket No. 100561

CREDIT ALLIANCE CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

Petition

Filed Nov. 6, 1939

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (SND–IT) dated August 9, 1939, and as a basis of its proceeding alleges as follows:

(1) The petitioner was incorporated in 1922 under the laws of the State of New York and was voluntarily dissolved on July 6, 1937. Under Section 29 of the New York General Corporation Law, the petitioner's corporate existence continues for the purpose of taking any action required to adjust and wind up its business and affairs, and it may sue or be sued in its corporate name. Under said law the directors and officers of the petitioner have full power and authority to take all action necessary to settle the petitioner's affairs, including the power to authorize the filing of this petition and to cerify the same.

The return of the petitioner was filed with the Collector for the District of Maryland.

3 (2) The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on August 9, 1939.

(3) The taxes in controversy are income taxes (corporation undistributed profits surtax) for the calendar year 1936, and in the amount of $121,814.49.

(4) The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent erred in disallowing to the petitioner a dividends paid credit of $947,228.40 for the calendar year 1936.

3.

and in not allowing the petitioner the full dividends paid credit claimed in its return of $950,734.80;

(b) The respondent erred in determining that the undistributed net income of the petitioner for the year 1936 was 595,328.76 or any sum whatsoever;

(c) The respondent erred in determining that there is a deficiency of $121,814.49 or any sum whatsoever in the income tax liability of the petitioner for the year 1936.

(5) The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner was organized under the laws of New York in 1922. From the time of its organization until its liquidation in 1936–1938, it was actively engaged in the commercial banking business. During the year 1930 Commercial Credit Company (Delaware), which was and is engaged in the same business, acquired over 80 percent of all classes of the petitioner's outstanding capital stock, and gradually increased its holdings in said stock until on December 1, 1936, and thereafter until all the capital stock was cancelled or redeemed, it owned 526,238 out of 528,186 outstanding shares, or 99.63% of all of the petitioner's outstanding capital stock.

4

(b) In 1936, in order to simplify the corporate structure, it was decided to liquidate and dissolve the petitioner in accordance with the provisions of Section 112 (b) (6) of the Revenue Act of 1936. Accordingly, on December 1, 1936, at a special meeting of the stockholders, it was resolved completely to liquidate the corporation pursuant to a plan of liquidation under which the distribution of all its property was to be completed within three years from the close of the calendar year 1936, with ultimate cancellation or redemption of all its outstanding capital stock. At the same meeting it was resolved that a distribution of property in liquidation equivalent to $1.80 per share be made out of surplus on December 10, 1936, to the stockholders of record as of December 3, 1936. It was also resolved that the capital of the corporation be reduced from $4,225,488.00 to $528,186.00, that the stated value of the 528,186 shares of capital stock accordingly be reduced from $8.00 per share to $1.00 per share, and that the difference of $7.00 per share be distributed as a "distribution of property in liquidation" on December 10, 1936, to stockholders of record as of December 3, 1936.

5

(c) Pursuant to the foregoing resolutions, the petitioner on December 10, 1936, distributed to its stockholders, out of surplus, cash and property of the value of $950,734.80, of which Commercial Credit Company (Delaware) received $947,228.40, the entire $950,734.80 being distributed out of surplus, all of which constituted earnings and profits accumulated after Feb-

ruary 28, 1913. It likewise distributed on the same day to its stockholders cash and property of the value of $3,697,302.00, of which Commercial Credit Company (Delaware) received $3,683,666.00. The entire $3,697,302.00 was distributed from assets made available by the reduction of the capital from $4,225,488.00 to $528,186,00.

(d) Further distributions to the stockholders were made in 1937, and on November 30, 1938, the liquidation of the petitioner was completed and the final distribution made. On July 6, 1937, pursuant to a resolution adopted at a special meeting of the stockholders held the preceding June 1, a certificate of dissolution was filed in the office of the Secretary of State of New York, and the petitioner was therefore formally dissolved on that date. Under the applicable provisions of New York law, the petitioner continues in existence for purposes of liquidating and winding up its affairs and may sue or be sued in its corporate name.

(e) The complete liquidation of the petitioner described above complied with all the provisions of Section 112 (b) (6) of the Revenue Act of 1936. Commercial Credit Company (Delaware), as the owner of 99.63% of all the outstanding shares of
6 stock of the petitioner, has received in liquidation approximately that proportion of its net assets. Under Section 112 (b) (6), no gain or loss was recognized to the Commercial Credit Company (Delaware) on this liquidation.

(f) For the calendar year 1936 the Commercial Credit Company (Delaware) reported a net income of $11,812,303.10. For the same period the petitioner had a net income of $703,147.25, on which it paid a normal tax of $104,312.09. It thus had an adjusted net income of $598,835.16, and in its return claimed a dividends paid credit of $950,734.80. In his 90-day letter to the petitioner, the Commissioner disallowed to the extent of $947,228.40 this dividends paid credit on the ground that this amount was distributed in a complete liquidation under Section 112 (b) (6) of the Revenue Act of 1936 without recognition of gain or loss to the recipient, and so could not be allowed as a dividends paid credit, citing Article 27 (f)-1 of Regulations 94. See Exhibit A, attached hereto.

(g) The petitioner avers that $950,734.80 is the proper credit for dividends paid by it in 1936, that it therefore has no undistributed net income for that year upon which any undistributed profits surtax is due, and that no deficiency exists with respect to its income tax for said year.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine:

(a) That the sum of $950,734.80, representing a distribution in liquidation on December 10, 1936, out of earnings and profits

accumulated since February 28, 1913, is properly allow-
7 able as a dividends paid credit for purposes of computing the undistributed profits surtax of the petitioner for the year 1936.

(b) That there is no deficiency in federal income taxes owing by the petitioner for the year 1936.

And petitioner prays for such other and further relief as the case may require.

DEAN ACHESON,
Dean Acheson,
Attorney for Petitioner,
701 Union Trust Bldg., Washington, D. C.
JACK J. LEVINSON,
Jack J. Levinson,
Attorney for Petitioner,
100 E. 42nd Street, New York City.

Of Counsel:
COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Washington, D. C.
DILLS, MUECKE, SCHELKER
& LEVINSON,
New York City.

8 *Exhibit A to petition*

Form 1230 SN–IT–1

Office of Internal Revenue Agent in Charge, Baltimore Division

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Baltimore, Maryland, August 9, 1939.

CREDIT ALLIANCE CORPORATION,
C/o COMMERCIAL CREDIT COMPANY,
First National Bank Building,
Baltimore, Maryland.

DEAR SIRS: You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1936, discloses a deficiency of $121,814.49 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, 311 Custom House, Balto., Md., for the attention of SND-IT. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (S) J. C. WILMER,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.
SWD/MM

9 STATEMENT

Credit Alliance Corporation, C/o Commercial Credit Company, First National Bank Building, Baltimore, Maryland

Tax Liability for the Taxable Year Ended December 31, 1936

Income Tax: Liability, $226,126.58. Assessed, $104,312.09. Deficiency, $121,814.49.

In making this determination of your income tax liability, careful consideration has been given to the reports of examination dated July 16, 1938, and April 3, 1939; to your protest dated May 9, 1939; and to the statements made at the conferences held on May 23, 1939, and June 21, 1939.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$699,687.63
Unallowable deductions and additional income:		
(a) Depreciation—automobiles	$3,857.35	
(b) Capital stock tax	6,167.48	
		10,024.83
Total		$709,712.46
Nontaxable income and additional deductions:		
(c) Tax on debentures	$942.90	
(d) Profit on sale of automobiles	5,125.42	
(e) Depreciation—furniture and fixtures	496.89	
		6,565.21
Net income adjusted		$703,147.25

Explanation of Adjustments

(a), (b), (c), (d), and (e). These adjustments were fully explained in the revenue agent's report dated July 16, 1938, copy of which was furnished you under date of September 29, 1938, which report is made a part of this letter. Since you agreed to the adjustments, no further explanation is made herein.

Your claim for a dividend paid credit in the amount of $950,734.80 has been allowed to the extent of $3,506.40 and disallowed to the extent of $947,228.40. The amount disallowed represents part of a distribution of property in liquidation made on December 10, 1936, to the Commercial Credit Company, the owner of 100% of the common stock and 99.614+% of the class A stock, the only classes of outstanding stock of your company.

10 Credit Alliance Corporation

This distribution, made pursuant to a resolution adopted at a special meeting of your stockholders held on December 1, 1936, is held to constitute a distribution in complete liquidation as defined by section 112 (b) (6) of the Revenue Act of 1936, and no dividend paid credit is allowable in respect of the said distribution. See article 27 (f)-1 of Regulations 94.

COMPUTATION OF TAX

Income Tax

Normal Tax:	
Taxable net income	$703,147.25
Net income for normal tax computation	$703,147.25
8% of $2,000.00—over $0 to $2,000	160.00
11% of $13,000.00—over $2,000 to $15,000	1,430.00
13% of $25,000.00—over $15,000 to $40,000	3,250.00
15% of $663,147.25—over $40,000	99,472.09
Total normal tax	$104,312.09

Surtax on Undistributed Profits

Taxable net income	$703,147.25
Less: Normal tax	104,312.09
(a) Adjusted net income	$598,835.16
Less: Dividends paid credit	3,506.40
(b) Undistributed net income	$595,328.76
(c) Remainder subject to surtax	$595,328.76
7% of $59,883.52	$4,191.85
12% of $59,883.52	7,186.02
17% of $119,767.03	20,360.40
22% of $119,767.03	26,348.75
27% of $236,027.66	63,727.47
Amount of tax	$121,814.49
Total surtax	121,814.49

Normal tax		$104,312.09
Total income tax (normal tax and surtax)		226,126.58
Income tax assessed (normal tax and surtax):		
Original, Account No. 400200	$103,793.14	
Additional, #2 list, Account No. 400200, Page 0, Line 7	518.95	
		104,312.09
Deficiency of income tax		$121,814.49

11 STATE OF MARYLAND,
City of Baltimore City, ss:

H. E. Spears, being duly sworn, says that he was at the date of dissolution the vice-president of the above-named petitioner; that pursuant to a resolution adopted by the Board of Directors at a meeting held on November 3, 1939, as provided in Section 29 of the New York Stock Corporation Law, he was duly appointed and authorized to continue as such vice-president with all the powers and duties of that office as provided in the bylaws, and was specifically authorized and empowered to execute on behalf of the corporation all necessary affidavits and other documents in connection with this petition; that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true except as to those facts stated to be upon information and belief, and those facts he believes to be true.

H. E. SPEARS.

Subscribed and sworn to before me this 3rd day of November, 1939.

[SEAL] Adelaide Hoffman,
Notary Public.

My commission expires May 5, 1941.

12 Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed Dec. 9, 1939

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that the respondent committed error as alleged in paragraph 4 of the petition and the subparagraphs thereof.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that in 1936 it was decided to liquidate
13 and dissolve the Credit Alliance Corporation but denies the remaining allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that petitioner distributed cash and property of the value of $950,734.80 to its stockholders on December 10, 1936, of which Commercial Credit Company (Delaware) received $947,228.40 as a stockholder. Admits further that petitioner distributed on the same day to its stockholders cash and property of the value of $3,697,302 of which Commercial Credit Company (Delaware) received $3,683,666 as a stockholder. Denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) Admits the allegations contained in subparagraph (d) of paragraph 5 of the petition.

(e) Admits that Commercial Credit Company (Delaware) as the owner of 99.63% of all the outstanding shares of stock of petitioner received in liquidation approximately that proportion of petitioner's net assets, but denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f) Denies that for the calendar year 1936 the Commercial Credit Company (Delaware) reported a net income of $11,812,303.16, but admits the remaining allegations contained in subparagraph (f) of paragraph 5 of the petition.

14 (g) Denies the allegations and averments contained in subparagraph (g) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

Signed J. P. WENCHEL,
J. P. Wenchel,
J. D. H.,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CHESTER A. GWINN,
Division Counsel.
JOE D. HUGHES,
Special Attorney, Bureau of Internal Revenue.

15 Before United States Board of Tax Appeals

[Title omitted.]

Stipulation of facts

Filed at hearing May 16, 1940

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts may be taken as true for the purpose of this proceeding and any other proceeding consolidated for hearing with it by proper motion, and that the same may be considered by the Board as offered in evidence by the parties to this proceeding; provided, however, that this stipulation shall be without prejudice to the right of either of the parties to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The petitioner was incorporated in 1922 under the
16 laws of the State of New York and was voluntarily dissolved on July 6, 1937. Under Section 29 of the New York General Corporation Law, the petitioner's corporate existence continues for the purpose of taking any action required to adjust and wind up its business and affairs, and it may sue or be sued in its corporate name. Under said law the directors and officers of the petitioner have full power and authority to take all action necessary to settle the petitioner's affairs, including the power to authorize the filing of the petition in this proceeding and to verify the same. The return of the petitioner for the calendar year 1936 was filed with the Collector of Internal Revenue for the District of Maryland.

2. The notice of deficiency, a true copy of which is attached to the petition heretofore filed in this proceeding and marked "Exhibit A" thereto, and which is incorporated herein by reference for the purpose of showing respondent's determination, was mailed to the petitioner on August 9, 1939. Respondent asserted therein a deficiency of $121,814.49 in income taxes (corporation undistributed profits surtax) for the calendar year 1936. Within the time prescribed by law, a proper petition was duly filed with the United States Board of Tax Appeals by the taxpayer.

3. From the time of petitioner's incorporation under the laws of the State of New York in 1922 until its liquidation in
1936-1938, it was actively engaged in the business of
17 financing the purchase of goods at wholesale and retail on the deferred payment plan. During the year 1930, Commercial Credit Company (Delaware), which was and is engaged

in the same business, acquired over 80 percent of each of the two classes of the petitioner's outstanding capital stock, and gradually increased its holdings in said stock until, on or before December 1, 1936, it owned 526,238 out of 528,186 outstanding shares, or 99.63% of all of the petitioner's outstanding capital stock. These holdings remained unchanged until all the capital stock was cancelled or redeemed.

4. In 1936, in order to simplify the corporate structure, it was decided to liquidate and dissolve the petitioner in accordance with the provisions of Section 112 (b) (6) of the Revenue Act of 1936. Accordingly, on December 1, 1936, at a special meeting of the stockholders, it was resolved completely to liquidate the corporation pursuant to a plan of liquidation under which the distribution of all its property was to be completed within three years from the close of the calendar year 1936, with ultimate cancellation or redemption of all its outstanding capital stock. At the same meeting it was resolved that a distribution of property in liquidation equivalent to $1.80 per share be made out of surplus on December 10, 1936, to the stockholders of record as of December 3, 1936. It was also resolved that the capital of the corporation be reduced from $4,225,488.00 to $528,186.00, that the stated
18 value of the 528,186 shares of capital stock accordingly be reduced from $8.00 per share to $1.00 per share, and that the difference of $7.00 per share be distributed as a "distribution of property in liquidation" on December 10, 1936, to stockholders of record as of December 3, 1936. Attached hereto marked "Exhibit 1" and incorporated in and made a part hereof by reference is a true and correct photostatic copy of the minutes of the above-mentioned meeting of the stockholders of December 1, 1936. Similar resolutions were passed at a meeting of the Board of Directors held subsequently on the same day.

5. Pursuant to the foregoing resolutions, the petitioner on December 10, 1936, distributed to its stockholders, out of earned surplus, cash and property of the value of $950,734.80, of which Commercial Credit Company (Delaware), as a stockholder, received $947,228.40. This entire distribution had an aggregate value of $950,734.80, considering the value of the property at its adjusted basis in the hands of petitioner at the time the dividend was paid, or at its fair market value at that time, whichever is lower. The earned surplus account of petitioner represented, in its entirety, earnings and profits accumulated since February 28, 1913; and there was no paid-in surplus. The petitioner likewise distributed on the same day to its stockholders cash and property

of the value of $3,697.302.00, of which Commercial Credit Company (Delaware), as a stockholder, received $3,683,666.00,
19 the entire sum being distributed from assets made available for distribution by the reduction of the capital from $4,225,488.00 to $528,186.00.

6. Further distributions to the stockholders were made in 1937, and on November 30, 1938, the liquidation of the petitioner was completed and the final distribution of its remaining assets made. On July 6, 1937, pursuant to a resolution adopted at a special meeting of the stockholders held the preceding June 1, a certificate of dissolution was filed in the office of the Secretary of State of New York, and the petitioner was formally and legally dissolved on that date. Under the applicable provisions of New York law, the petitioner continues in existence for purposes of liquidating and winding up its affairs and may sue or be sued in its corporate name.

7. The complete liquidation of the petitioner described above complied with the provisions of Section 112 (b) (6) of the Revenue Acts of 1936 and 1938. Commercial Credit Company (Delaware), as the owner of 99.63% of all the outstanding shares of stock of the petitioner, has received in liquidation approximately that proportion of its net assets. Under said Section 112 (b) (6), no gain or loss is recognized to the Commercial Credit Company (Delaware) on this liquidation.

8. No part of the distributions received from petitioner by Commercial Credit Company (Delaware), as a stockholder, on December 30, 1936, was distributed in 1936 by Commercial
20 Credit Company (Delaware) as a taxable dividend to its shareholders within the meaning of Article 27 (f)-1 (c) of Regulations 94, and there was no apportionment, allocation, and payment as a dividend by Commercial Credit Company (Delaware) of any part of the sums so received as defined in that article.

9. Attached hereto and made a part hereof and marked "Exhibit 2" is a photostatic copy of a true and correct copy of the federal income tax return of Commercial Credit Company (Delaware) for the calendar year 1936. Such return was filed with the Collector of Internal Revenue for the District of Maryland.

10. Attached hereto and made a part hereof and marked "Exhibit 3" is a photostatic copy of a true and correct copy of petitioner's federal income tax return for the calendar year 1936.

DEAN G. ACHESON,
Dean G. Acheson,
Counsel for Petitioner,
701 Union Trust Bldg.,
Washington, D. C.

JACK J. LEVINSON,
Jack J. Levinson,
Counsel for Petitioner,
100 E. 42nd Street,
New York City.

J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

(Exhibits to stipulation of facts omitted in printing. See stipulation appearing at fol. 81.)

40 Before United States Board of Tax Appeals

CREDIT ALLIANCE CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 100561. Promulgated October 22, 1940

Petitioner, a corporation, distributed from earnings and profits accumulated since February 28, 1913, and in complete liquidation, approximately 99 percent of its assets to a corporation holding that percentage of its stock. Under section 112 (b) (6), Revenue Act of 1936, no gain or loss was recognized to the distributee. *Held*, that under section 27 (f), Revenue Act of 1936, the distribution to the parent corporation was properly chargeable to earnings or profits, and must be treated as a taxable dividend paid for the purpose of computing dividends paid credit without limitation by subsection (h) and in the calculation of tax upon un-

distributed net income it entitles the petitioner to credit in the amount of the distribution.

Dean Acheson, Esq., and W. Graham Clayton., Esq., for the petitioner. Joe D. Hughes, Esq., for the respondent.

This proceeding involves undistributed profits surtax for the year 1936. Deficiency was determined in the amount of $121,814.49, and error is asserted by the petitioner as to the entire amount.

Findings of fact

A stipulation of facts, including documentary exhibits attached thereto, was filed at the hearing and we find the facts as so stipulated. So far as pertinent to examination of the question propounded, they may be stated as follows:

The petitioner, a corporation, filed its Federal income tax return for 1936 with the collector for the District of Maryland. It was organized in 1922 under the law of New York and dissolved in July 1937. During its existence the petitioner was actively engaged in business. In 1930 the Commercial Credit Co., a Delaware corporation, acquired more than 80 percent of petitioner's outstanding capital stock and by December 1, 1936, owned 526,238 shares out of 528,186 shares outstanding, or 99.63 percent thereof. Its holding continued the same until cancellation of all stock, which took place beginning in 1936. In that year liquidation was decided upon, in order to simplify the corporate structure in accordance with section 112 (b) (6), Revenue Act of 1936,
41 and on December 1, 1936, the stockholders in special meeting, and later on the same day the directors, resolved to liquidate the corporation completely within three years, to distribute in liquidation property equivalent to $1.80 per share, to reduce the capital from $4,225,488 to $528,186, reducing the stated value of stock from $8 per share to $1 per share, and to distribute $7 per share in liquidation, all on December 10, 1936, to stockholders of record December 3, 1936. The resolutions were carried out, and out of earned surplus there were distributed to the stockholders cash and property, all of the value of $950,734.80. Thereof the Commercial Credit Co. received $947,228.40. The earned surplus account represented only earnings and profits accumulated since February 28, 1913; there was no paid-in surplus. On the same day petitioner, from assets made available by the reduction of capital from $4,225,488 to $528,186, distributed cash, and property all of the value of $3,697,302, of which the Commercial Credit Co. received $3,683,666. Further distributions were made in 1937 and final distribution was made and liquidation completed on November 30, 1938. Certification of dissolu-

tion had been filed in the office of the Secretary of State of New York on July 6, 1937, and the corporation legally dissolved on that date. The liquidation complied with the provisions of section 112 (b) (6), Revenue Act of 1936. The Commercial Credit Co. did not distribute in 1936 to its stockholders any of the distribution received by it from the petitioner on December 10, 1936, and did not apportion or allocate any part thereof to the petitioner.

Opinion

DISNEY: The question before us is: To what dividends paid credit is the petitioner entitled under the Revenue Act of 1936 because of distributions made by it in that year? Section 14 of that act imposes a tax upon "undistributed net income", to compute which it is necessary to deduct from net income (adjusted in other particulars not here important) the sum of the dividends paid credit. Section 27 (a) provides that such dividends paid credit shall be the amount of the dividends paid during the taxable year. Section 27, by subsections (f) and (h), provides as follows:

"(f) DISTRIBUTIONS IN LIQUIDATION.—In the case of amounts distributed in liquidation the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purposes of computing the dividends paid credit under this section, be treated as a taxable dividend paid.

* * * * *

"(h) NONTAXABLE DISTRIBUTIONS.—If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part."

42 In the taxable year the petitioner distributed from its surplus earnings and profits and by way of complete liquidation cash and property of the value of $950,734.80, of which $947,228.46 or 99.63 percent of the distribution was received by a corporation owning the same percentage of its stock. Petitioner therefore contends that the amount distributed to the parent corporation is the basis for a dividends paid credit under the terms of section 27 (f); while respondent argues that under section 27 (h) the distribution does not constitute a dividends paid credit, for the reason that the distribution is not a "taxable dividend" because profit or loss is not recognized in the hands of the dis-

tributee, under the language of section 112 (b) (6) of the Revenue Act of 1936.[1]

1. The petitioner argues that subsection (f) is an exception to subsection (h); the respondent, that subsection (h) is a limitation upon subsection (f). The petitioner contends that it was the intent of Congress through section 112 (b) (6) to encourage liquidation of corporations in chains of holding companies and that to deny the dividends paid credit would nullify such encouragement; whereas the respondent contends that the prime object in the legislation was to force either the corporation or the distributee-stockholder to pay tax.

Excerpts from the committee reports can be found to bear out in some measure both views. We think it obvious that Congress had in mind both the idea of forcing the payment of tax upon corporate earnings and of encouraging liquidations of corporations forming parts of corporate chains. After reviewing the various committee reports on the subject, we have concluded that they are not inconsistent upon the present question, and that, considering the form of the legislation, it can be resolved by the application of the usual principles of interpretation.

With reference to such principles of interpretation, the petitioner urges that subsection (f) is a more particular subsection than subsection (h), and therefore under the familiar principle in that regard must control over subsection (h); while the respondent points out that subsection (h) is later than subsection (f) in the statute and therefore should be considered as an exception to subsection (f). We do not consider the latter principle of great weight. Though sometimes recognized, it is "a purely arbitrary rule of construction which is subject to the rule that the statute must be construed as a whole to find the legislative intent." 59 C. J. 1000. It has been called artificial, not inflexible, and to be resorted to only in extremis. People ex rel Mason v. McClane, 90 N. Y. 83; Commercial Trust Co. v. Hudson County Board of Taxation, 86 N. J. L. 424; 92 Atl. 263.

In Rodgers v. United States, 185 U. S. 83, the Court said:

"* * * So, when in section 13, Congress prescribed a general rule for the salaries of naval officers, such general rule cannot

[1] (6) PROPERTY RECEIVED BY CORPORATION ON COMPLETE LIQUIDATION OF ANOTHER.—No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. For the purposes of this paragraph a distribution shall be considered to be in complete liquidation only if—

(A) the corporation receiving such property was, on the date of the adoption of the plan of liquidation, and has continued to be at all times until the receipt of the property, the owner of stock (in such other corporation) possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote and the owner of at least 80 per centum of the total number of shares of all other classes of stock (except non-voting stock which is limited and preferred as to dividends), and was at no time on or after the date of the adoption of the plan of liquidation and until the receipt of the property the owner of a greater percentage of any class of stock than the percentage of such class owned at the time of the receipt of the property;

* * *

within the scope of this canon be understood as repealing the special provision in the prior section, but the special provision must be taken as an exception to and limitation of the general rule."

As indicated in Rodgers v. United States, supra, the common rule that a specific provision shall be held to control one more general is more salutary and stronger than the idea that the later of two provisions is the exception. We therefore consider the question whether subsection (f) or, on the contrary, subsection (h) is the more specific provision. Subsection (h) concerns itself with distributions in general, the subject matter being that any part of a distribution to confer dividends paid credit must be a taxable dividend. Subsection (f) concerns itself with distributions in liquidation, and the gist of the subject matter is that any part of a liquidation distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend paid. It seems to us wholly obvious that, on the face of the two subsections (f) is the more specific. Indeed, not only does it limit its effect to distributions in liquidation, patently a subdivision of "distributions" covered by subsection (h), but closer examination reveals that it is even more specific, for it involves, covers, and is effective upon not the entire distribution in liquidation, but only a specific part thereof, to wit, the part "which is properly chargeable to the earnings or profits," etc. We think it can not be denied that subsection (f) is the more specific subsection and that its language in general is to be given effect greater than that of subsection (h). Since in Rodgers v. United States, supra, the Court followed the more particular previous section rather than the later more general provision as to salaries of naval officers, we seem to be required here to consider and give effect to what is said in subsection (f) as to a certain part of a distribution in liquidation, rather than the language of subsection (h) as to distributions in general. The respondent calls our attention to the case of Centennial Oil Co. v. Thomas, 109 Fed. (2d) 359; certiorari denied, 309 U. S. 690, in which the majority opinion held that
44 "Subsection (h) modifies subsection (f) * * * by way of exception," and denies dividends paid credit for a distribution in liquidation under section 112 (b) (6). The petitioner takes sharp issue with the decision and urges us to follow the views expressed in an extensive dissenting opinion to the effect that subsection (f) is not in conflict with, or modified by, subsection (h) and confers dividends paid credit.

Examination of the majority view discloses that it relies, without discussion, upon the idea that subsection (h) modifies (f)

as an exception thereto and that, though a distribution in liquidation of profits will in general be treated as an ordinary taxable dividend, conferring dividends paid credit, credit is not to be allowed unless the distribution is a taxable dividend in the hands of the distributee. The conclusion of the court that subsection (h) is an exception to subsection (f), though urged upon us by the respondent here, is in contradiction of language used in the Treasury regulation propounded upon the subject.

Regulations 94, article 27 (f)–1, in part, recites:

To the general rule that the dividends paid credit is allowable only with respect to taxable dividends paid, section 27 (f) makes one exception, namely, for that part of an amount distributed in liquidation which, under the Act, constitutes a distribution of, and is properly chargeable to, earnings or profits accumulated after February 28, 1913. * * *

We are of the opinion that the above language of the regulations is properly based upon that of the statute, not only because of the fact that the language in subsection (f) is more specific than that in subsection (h), but because the language of subsection (f) precludes the application of subsection (h) to it, if, as principles of statutory interpretation require, we give effect to all of the language of both subsections. Subsection (h) provides in effect that in order to confer dividends paid credit a distribution must be a taxable dividend in the hands of shareholders who are subject to taxation; but subsection (f) seems on its face designed to fulfill the requirement of "taxable dividend" in the case of a distribution in liquidation as to the part properly chargeable to earnings and profits, for it, with minute particularity, provides that such part of the liquidation distribution "shall * * * be treated as a taxable dividend paid." In other words, subsection (f) provides that the distribution complies with subsection (a) in that it shall be considered "paid" and further complies with subsection (h) in that it shall be treated as "a taxable dividend." To say, as does the respondent, that subsection (h) limits (f) and provides that although under the language thereof the distribution shall "be treated as a taxable dividend paid," it must, nevertheless, in order to confer dividends paid credit, be to the distributee "a taxable dividend," seems repetition without meaning, for subsection (f) has already provided that this particular type of distribution shall be treated as such taxable dividend. Not only so, but it shall be so treated "for the purposes of computing the dividends paid credit under this section." If subsection (f) does not entitle the distribution there involved to the dividends paid credit, it would seem useless to provide treatment of it for the purpose of computing such dividends paid credit. Computa-

tion thereof without allowance would be idle. If subsection (f) merely provided that the distribution there involved be "treated as a dividend," plainly subsection (h) would directly apply and credit would be denied if the dividend was not also taxable. But the same phrase which provides treatment of the distribution as a dividend requires treatment as taxable dividend. There is no opportunity for the distribution to be considered a dividend without being considered taxable and paid, and subsection (h), requiring a distribution to be taxable, has already been complied with, and is in that respect superfluous. In effect, respondent's view that subsection (h) must be applied to subsection (f) is tantamount to the view that subsection (f) merely provides that the distribution be considered a "dividend paid" and ignores the expression "taxable." Congress might well have so provided. A distribution in liquidation is not considered a dividend; Hellmich v. Hellman, 276 U. S. 233; and the object of subsection (f) in that regard is plain—to include in the category of "dividends" that which is not a dividend, to wit, a distribution in liquidation. Had Congress stopped there, that purpose would have been accomplished, and, as the respondent argues, distributions in liquidation (to the extent of the part "properly chargeable to the earnings or profits," etc.) would, though treated as dividends, still have been subject to the more specific requirement of subsection (h) that they be "taxable," and since under section 112 (b) (6) there is no recognition of gain or loss in case of the liquidation involved, the dividends paid credit would not have been allowable. But Congress did not stop at that point, but proceeded further to provide specifically that the treatment of the distribution should be also "as taxable," and, as if to close the matter completely, "paid" as well. Subsection (f) provides the specification "taxable" and (h) adds nothing in that regard.

Viewing all of the language of both sections as we must, and giving it ordinary significance, we come to the conclusion that subsection (f) is not modified by subsection (h), and, with all respect for the majority opinion in Centennial Oil Co. v. Thomas, supra, we differ with the conclusion there expressed.

Though our conclusion that subsection (h) does not modify or limit subsection (f) may be reached by considering subsection (f) as modifying the more general terms of subsection (h), we think that neither section modifies the other, but that they cover different ground. In our opinion, Congress by subsection
46 (h) intended to cover dividend distributions and to say that, if taxable, they confer dividends paid credit; and, separately, intended by subsection (f) to cover a different category, to wit, distributions in liquidation, and to say that, although not within the category of "dividends," they shall be treated so

as to confer dividends paid credit, to the limited degree provided in subsection (f). The fact that dividends and distributions in liquidation had been theretofore by the Supreme Court considered in different categories suggests a separation made by Congress between subsections (f) and (h), the one covering dividends, the other, to a limited degree, liquidation distributions, which would otherwise not receive treatment as dividends, for subsection (h) by its terms requires a distribution to be a "taxable *dividend*" (italics supplied) in order to gain the "dividends paid" credit. Subsection (h) does not cover the subject matter of subsection (f). Covering dividends, it may modify subsection (g) as to preferential *dividends* without modifying subsection (f), which embraces a different subject. Its use of the word "dividend" does not limit (f), but eliminates it from the category covered by (h). It is not without significance that subsection (h) includes and covers, by special parenthetic inclusion, subsection (e) as to stock dividends, but does not so include subsection (f). Subsections (e) and (f) both cover categories of distribution ordinarily viewed differently from ordinary dividends. Under the doctrine of *expressio unius exclusio alterius*, there is reason to believe that subsection (h) was definitely not intended to cover the subject matter of subsection (f).

2. However, the conclusion that subsection (h) does not limit subsection (f) does not settle the problem presented to us. The respondent contends, in effect, that subsection (f) confers dividends paid credit only as to that part of a distribution in liquidation which is "properly chargeable to the earnings or profits accumulated after February 28, 1913," that it is not properly chargeable if there is no recognition of profit or loss to the distributee, and that, since section 112 (b) (6) precludes such recognition, no dividends paid credit can be allowed. An interpretation of the expression "properly chargeable to the earnings or profits" is required of us. The petitioner's view is that only a distinction between charge to earnings or profits, or to capital, was intended by Congress; the respondent's attitude is based upon such cases as Commissioner v. Sansome, 60 Fed. (2d) 931; certiorari denied, 287 U. S. 667, which hold that if a corporate reorganization results in no recognition of profit or loss to the distributee corporation, as to earnings or profits of the distributor corporation, they remain for purposes of distribution "earnings or profits" of the distributee corporation, and do not become capital of the
47 distributee. The precise question in the Sansome case was whether a stockholder in both the distributor and the distributee corporation should, upon the liquidation of the distributee, be taxed upon what he received as a dividend or be allowed to apply against it the cost of his stock in the original corporation.

Under the then revenue act, a distribution in liquidation was taxable as a dividend and not as capital gain, to the extent of corporate earnings or profits. The court held the distribution to be from earnings and profits, though the distributee corporation had itself made no profit. Does the Sansome decision have bearing upon section 27 (f), Revenue Act of 1936, as to undistributed profits tax?

Our difficulty with the respondent's view is that it is not in accord with the usual significance of the term "properly chargeable" to the earnings and profits. We think it obvious that ordinary use and interpretation of the expression indicates what is paid or distributed out of earnings or profits, as contradistinguished from that which is distributed out of the capital, such as was done in the amount of approximately $3,700,000 in the liquidation here involved. That only a distinction between capital and earnings or profits is intended in section 27 (f) seems indicated by the language of section 115 (g) of the Revenue Act of 1936. Therein, with reference to distributions in redemption of stock essentially equivalent to the distribution of a taxable dividend, it is provided that the amount distributed shall be treated as a taxable dividend paid "to the extent that it *represents* a distribution of earnings or profits accumulated after February 28, 1913." (Italics supplied.) Patently, a distinction between capital and earnings or profits was intended. Was that not all that was intended in section 27 (f)? Again we find in section 115 (c) the provision that in case of distribution in partial liquidation the part of such distribution "which is properly chargeable to *capital account* shall not be considered a distribution of earnings or profits." (Italics supplied.) This seems, in the converse, to indicate the same distinction between capital account and earnings or profits, as herein involved. The same is true of section 113 (b) (1), having reference to adjustment of the basis for determining gain or loss. "Proper adjustment * * * shall in all cases be made * * * for expenditures, receipts, losses, or other items, *properly chargeable to capital account*." (Italics supplied.) It is obvious that in subsection (f) the language "the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913" eliminates earnings or profits accumulated prior to that date. It seems equally plain that Congress did not intend to confer dividends paid credit for a return of capital. The intent, in our opinion, went no farther. Indeed, Regulations 94, article 27 (f)-1 (*b*) states: "To determine the
48 amount properly chargeable to the earnings or profits accumulated since February 28, 1913, there must be deducted from the amount of the distribution that part allocable to capital account." The regulation goes on, however, to state that, "The

capital account, for purposes of these regulations, includes" amounts representing the value of the stock, the stockholder's share of paid-in surplus and "such other corporate items, if any, which for purposes of income taxation, are treated like capital in that they are not taxable dividends when distributed but are applied against and reduce the basis of the stock" and concludes that the remainder of the distribution in liquidation is properly chargeable to earnings and profits. Yet the respondent allowed the dividends paid credit upon the amount distributed to the minority stockholders—which amounts, of course, because distributed in liquidation "are applied against and reduce the basis of the stock" under section 115 (c), being "treated as in full payment in exchange for the stock." Thus we see that respondent's reason for a distinction between petitioner and the minority stockholders fails, and his position is seen to depend upon nontaxability of the distribution. The intent of the Revenue Act of 1936 in this matter is indicated by the report of the subcommittee to the Committee on Ways and Means (March 26, 1936), recommending the undistributed profits tax:

"In computing undistributed net income, it is recommended that the corporation be allowed a deduction for any part of liquidating dividends properly allocable to earnings and profits, but no deduction shall be given for the portion thereof properly chargeable to capital account."

We think, therefore, that such cases as Commissioner v. Sansome, supra, do not suffice to demonstrate that under section 27 (f), and "for the purposes of computing the dividends paid credit under this section", there was no part of the distribution in liquidation "properly chargeable to the earnings or profits * * *." Cases considering reorganizations and "transfer of profits" intact, as respondent phrases the matter, do not convince that herein there was not distribution of profits, to a distributee in liquidation. Such cases as Commissioner v. Sansome, supra, consider and interpret different statutes and have to do with the position of a transferee corporation, not the distributing corporation, as here, and the fact that the distributee may be considered to be distributing its profits and not capital when it distributes the distribution in liquidation does not, in our opinion, for purposes of section 27 of the Revenue Act of 1936, determine the present question of dividends paid credit.

In arriving at this conclusion we do not disregard respondent's contention that the Revenue Act of 1938 added "property or money" to the language of section 115 (h) of the Act of 1936, to the effect that a nontaxable distribution of "stock or securities"
49 of the distributor or another corporation should not be considered distribution of earnings or profits. Respondent

argues that the 1938 Act merely clarifies the intent of that of 1936. We do not think that the latter act was a clarification. It seems, on the contrary, clearly an addition to what was not enacted in 1936. We therefore do not apply it to the transactions in 1936 here involved. Moreover, the fact that section 115 (h) provides that distribution of stock or securities shall not be considered distribution of earnings or profits if no gain to distributee is recognized, indicates that here, where stock or securities are not involved, the distribution under the general language of section 115 (b) "is made out of earnings or profits" regardless as to recognition of gain to the distributee.

The respondent says that there has been implied Congressional approval of its interpretation of section 27, inasmuch as Regulations 94, article 27 (f)–1, setting forth his view of the statute, was promulgated prior to the substantial reenactment of the 1936 statute in 1938. This is, of course, a "weight in the scale", Woolworth Co. 1. United States, 91 Fed. (2d) 973, but to be somewhat sparingly applied where the reenactment is not continued and the statute is later repealed, as herein in 1939. Moreover, it can not with accuracy be said there was reenactment without substantial change in 1938, since the undistributed profits tax was not continued in the legislation of that year. Considering the whole state of flux of the subject, we think we should give no great consideration, in construing the 1936 Act, to what was done in 1938, and undone in 1939.

Petitioner contends that the respondent's Regulations 94, article 27 (f)–1 (*c*), is without statutory authority. That section provides in effect that in case a corporation distributes in liquidation to another corporation its earnings or profits under section 112 (b) (6), any dividend paid by the transferee corporation later in the same year may be allocated to the transferor as a distribution of its earnings or profits. Inasmuch as herein petitioner's parent corporation-distributee paid no such dividends during the taxable year and no such allocation was made, we consider it unnecessary here to pass upon the validity of that portion of the regulation. Our conclusions above expressed signify that we consider as exceeding the statute Regulations 94, article 27 (f)–1 (*a*), (*b*), wherein there is in substance set forth the view of section 27 (f) which is advanced by the respondent herein.

We therefore conclude and hold that the petitioner is entitled to dividends paid credit in the amount of the distribution in liquidation to the Commercial Credit Co., to wit, $947,228.40, and that the respondent erred in disallowing same.

Reviewed by the Board.

Decision will be entered for the petitioner.

50 *Dissenting opinion*

BLACK, dissenting: I respectfully dissent from the majority opinion. I am unable to agree with the view that subsection (f) is not limited by subsection (h) of section 27, Revenue Act of 1936. My views in that respect harmonize with the views expressed in the opinion of the majority of the court in Centennial Oil Co. v. Thomas, 109 Fed. (2d) 359. Hence, I will only say that I think that case should be followed in our decision of the instant case.

TURNER agrees with this dissent.

51 Before United States Board of Tax Appeals
Washington

Docket No. 100561

CREDIT ALLIANCE CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion promulgated October 22, 1940, it is

Ordered and decided: That there is no deficiency in undistributed profits surtax for the year 1936.

Enter:

(s) R. L. DISNEY, *Member.*

Entered Oct. 25, 1940.

52 In United States Circuit Court of Appeals
For the Fourth Circuit

B. T. A. Docket No. 100561

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

CREDIT ALLIANCE CORPORATION, RESPONDENT ON REVIEW

Petition for review and assignments of error

Filed Jan. 17, 1941

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Rev-

enue, and John W. Smith, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review is the duly appointed, qualified, and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, appointed and holding his office by authority of the laws of the United States; that the respondent on review, Credit Alliance Corporation, hereinafter referred to as the taxpayer, is a corporation incorporated under the laws of the State of New York in 1922, with its principal place of
53 business at Baltimore, Maryland, and filed its Federal income tax return (Form 1120) for the calendar year 1936 with the Collector of Internal Revenue for the District of Maryland, Baltimore, Maryland, whose office is within the jurisdiction of this Honorable Court; that the Court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Fourth Circuit.

The Commissioner files this petition for review pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II

NATURE OF CONTROVERSY

The nature of the controversy is as follows, to wit:

In 1930 the Commercial Credit Company, a Delaware Corporation, acquired more than eighty per cent of taxpayer's outstanding capital stock and by December 1, 1936, owned 526,238 shares out of 528,186 shares outstanding, or 99.63 percent. Its holding continued the same until cancellation of all stock, which took place in 1936. In that year liquidation was decided upon in order to simplify the corporate structure. On December 1, 1936, the stockholders, in special meeting, and later on the same day, the directors, resolved to liquidate the corporation completely within three years. The resolutions were carried out and as a result the taxpayer distributed to its stockholders as a liquidating dividend in 1936, the total sum of $4,648,036.80, of which $950,734.80 represented earned surplus accumulated after Febru-
ary 28, 1913. Taxpayer's parent, the Commercial Credit
54 Company, received $4,630,894.40, of which $947,228.40 represented surplus accumulated from earnings after February 28, 1913. In its return for the year 1936, the taxpayer claimed the sum of $950,734.80 as a dividend paid credit for said year under subsection (a) of Section 27 of the Revenue Act of 1936, 49 Stat. 1648.

On August 9, 1939, the Commissioner mailed to the aforesaid taxpayer a notice of deficiency in Federal income tax for the calendar year 1936 in the amount of $121,814.49. In arriving at said deficiency the Commissioner determined that the amount of $947,228.40 received by taxpayer's parent, the Commercial Credit Company, did not constitute a dividend paid credit within the meaning of Section 27 of the Revenue Act of 1936 for the reason that the distribution was not a "taxable dividend" in the hands of the distributee under the provisions of Section 112 (b) (6) of the same Act.

On November 6, 1939, the taxpayer filed a petition with the United States Board of Tax Appeals appealing from the deficiency set forth in the notice of deficiency aforesaid, alleging that the Commissioner had erred in disallowing a dividend paid credit in the amount of $947,228.40 for the year 1936. The Commissioner filed his answer to the petition on December 9, 1939. The proceedings came on for hearing before a Division of the Board at Washington, D. C. on May 16, 1940. On October 22, 1940, the Board promulgated its opinion wherein it held that under Section 27 (f) of the Revenue Act of 1936, the distribution
55 of $947,228.40 to the parent corporation was properly chargeable to earnings or profits, and must be treated as a taxable dividend paid for the purpose of computing dividends paid credit, without limitation by subsection (h) of Section 27, and in the calculation of tax upon undistributed net income the taxpayer is entitled to credit in the amount of the distribution amounting to $947,228.40. On October 25, 1940, the Board entered its final decision wherein and whereby it ordered and decided that there was no deficiency in undistributed profits surtax for the year 1936.

III

ASSIGNMENTS OF ERROR

The Commissioner, being aggrieved by the conclusions of law contained in the decision of the United States Board of Tax Appeals and by its final order redetermining no deficiency in Federal income tax for the calendar year 1936, desires to obtain a review by the United States Circuit Court of Appeals for the Fourth Circuit.

The Commissioner's assignments of error are as follows:

1. The Board erred in failing to hold and decide that for the purpose of Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648, the amount of $947,228.40, was not properly chargeable to earnings or profits accumulated after February 28, 1913.

2. The Board erred in holding and deciding that the distribution to the parent corporation, Commercial Credit Com-

56 pany, amounting to $947,228.40, was properly chargeable to earnings or profits accumulated after February 28, 1913, and that the taxpayer was entitled to dividends paid credit thereon.

3. The Board erred in failing to hold and decide that the amount of $947,228.40 was not allowable as a dividends paid credit under Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648.

4. The Board erred in not holding and deciding that the allowance of $947,228.40 as a dividends paid credit was prohibited by Section 27 (h) of the Revenue Act of 1936, 49 Stat. 1648.

5. The Board erred in holding and deciding that Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648, is not modified by subsection (h) of the said Section 27.

6. The Board erred in holding and deciding that Section 27 (h) of the Revenue Act of 1936, 49 Stat. 1648, does not limit the provisions of Section 27 (f) of said Act.

7. The Board erred in entering its decision of redetermination that there is no deficiency in undistributed profits surtax for the year 1936.

8. The Board erred in failing and refusing to enter a decision of redetermination that there is a deficiency in undistributed profits surtax for the year 1936 in the amount of $121,814.49.

57 9. The Board erred in that its decision is not supported by the evidence.

10. The Board erred in that its decision is contrary to law and regulations.

Wherefore the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fourth Circuit, that a transcript of record be prepared in accordance with the rules of said Court and transmitted to the Clerk of said Court for filing, and that proper action be taken to the end that the errors complained of may be reviewed by said Court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
R. L. W.

(Sgd.) J. P. WENCHEL,
J. P. Wenchel,
R. L. W.
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN W. SMITH,
Special Attorney,
Bureau of Internal Revenue.
JWS; cm 1-16-41

58 [*Duly sworn to by John W. Smith; jurat omitted in printing.*]

59 In United States Circuit Court of Appeals for the Fourth Circuit.

[Title omitted.]

Notice of filing petition for review

Filed Jan. 23, 1941

To: CREDIT ALLIANCE CORPORATION,
First National Bank Building, Baltimore, Maryland.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of January, 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fourth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of January, 1941.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 18 day of January, 1941.

CREDIT ALLIANCE CORPORATION,
By (Signed) H. E. SPEARS,
Respondent on Review.

60 In United States Circuit Court of Appeals for the Fourth Circuit

[Title omitted.]

Notice of filing petition for review

Filed Jan. 23, 1941

To: DEAN G. ACHESON AND WILLIAM G. CLAYTOR,
Union Trust Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of January 1941, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C.,

a petition for review by the United States Circuit Court of Appeals for the Fourth Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of January, 1941.

(S) B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 22 day of January 1941.

(S) DEAN G. ACHESON,
(S) WILLIAM G. CLAYTOR,
Counsel for Respondent on Review.

61 In United States Circuit Court of Appeals for the Fourth Circuit

[Title omitted.]

Statement of points

Filed April 10, 1941

Now comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors on which he intends to rely in this review:

1. The Board erred in failing to hold and decide that for the purpose of Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648, the amount of $947,228.40 was not properly chargeable to earnings or profits accumulated after February 28, 1913.

2. The Board erred in holding and deciding that the distribution to the parent corporation, Commercial Credit Company, amounting to $947,228.40, was properly chargeable to earnings or profits accumulated after February 28, 1913, and that the taxpayer was entitled to dividends paid credit thereon.

3. The Board erred in failing to hold and decide that the amount of $947,228.40 was not allowable as a dividends paid credit under Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648.

4. The Board erred in not holding and deciding that the allowance of $947,228.40 as a dividends paid credit was prohibited by Section 27 (h) of the Revenue Act of 1936, 49 Stat. 1648.

62 5. The Board erred in holding and deciding that Section 27 (f) of the Revenue Act of 1936, 49 Stat. 1648, is not modified by subsection (h) of the said Section 27.

6. The Board erred in holding and deciding that Section 27 (h) of the Revenue Act of 1936, 49 Stat. 1648, does not limit the provisions of Section 27 (f) of said Act.

7. The Board erred in entering its decision of redetermination that there is no deficiency in undistributed profits surtax for the year 1936.

8. The Board erred in failing and refusing to enter a decision of redetermination that there is a deficiency in undistributed profits surtax for the year 1936 in the amount of $121,814.49.

9. The Board erred in that its decision is not supported by the evidence.

10. The Board erred in that its decision is contrary to law and regulations.

J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within statement of points is hereby admitted this 9th day of April, 1941.

NEWELL W. ELLISON,
Counsel for Respondent on Review.

JWS:br 4/7/41.

63 In United States Circuit Court of Appeals for the Fourth Circuit

[Title omitted.]

Designation of portions of record, proceedings and evidence to be contained in the record on review

Filed April 10, 1941

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fourth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of all proceedings before the Board.

2. Pleadings before the Board:

(a) Petition including copy of deficiency letter, Exhibit A, attached.

(b) Answer.

(c) Reply to Answer (not of record).

3. Stipulation of facts with Exhibits 1, 2 and 3 attached.

4. Findings of fact, opinion, and decision of the Board.

64 5. Petition for review together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. Statement of Points to be relied upon.

7. Orders enlarging time for transmission of the transcript of the record on review (not included in record).

8. This designation of portions of record, proceedings and evidence to be contained in the record on review.

Said transcript is to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Fourth Circuit.

J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within designation of portions of record, proceedings and evidence to be contained in the record on review is hereby admitted this 9th day of April, 1941. Agreed to:

NEWELL W. ELLISON,
Counsel for Respondent on Review.

JWS:br 4/7/41

65 [Clerk's Certificate to foregoing transcript omitted in printing.]

66 In the United States Circuit Court of Appeals for the Fourth Circuit

No. 4801

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

versus

CREDIT ALLIANCE CORPORATION, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

Docket entries

April 12, 1941, the transcript of record is filed and the cause docketed.

Same day, certified copy of order extending to April 17, 1941, the time for transmission and delivery of the record, is filed.

April 15, 1941, the appearance of Samuel O. Clark, Jr., Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, is entered for the petitioner.

Same day, the appearance of Newell W. Ellison, Jack J. Levinson, and Christopher S. Sargent is entered for the respondent.

April 16, 1941, the appearance of J. P. Wenchel, Chief Counsel, and John W. Smith, Special Attorney, Bureau of Internal Revenue, is entered for the petitioner.

67 April 29, 1941, brief and appendix on behalf of the respondent are filed.

May 13, 1941, the appearance of Lee A. Jackson and Arthur A. Armstrong, Special Assistants to the Attorney General, is entered for the petitioner.

Same day, brief and appendix on behalf of the petitioner are filed.

ARGUMENT OF CAUSE

June 13, 1941 (June term, 1941), cause came on to be heard before Soper, Dobie, and Northcott, Circuit Judges, and was argued by counsel and submitted.

68 In United States Circuit Court of Appeals, Fourth Circuit

No. 4801

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

versus

CREDIT ALLIANCE CORPORATION, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

(Argued June 13, 1941. Decided July 21, 1941)

Before SOPER, DOBIE, and NORTHCOTT, Circuit Judges

Arthur A. Armstrong, Special Assistant to the Attorney General (Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key and Lee A. Jackson, Special Assistants to the Attorney General, on brief) for Petitioner, and Newell W. Ellison (Jack J. Levinson and Christopher S. Sargent on brief) for Respondent.

Opinion

Filed July 21, 1941

69 SOPER, Circuit Judge: In the course of a complete liquidation in 1936, the Credit Alliance Corporation, the taxpayer, made a distribution to the Commercial Credit Company, its parent corporation, of earnings and profits accrued since February 28, 1913. No gain or loss resulted to the parent corporation from the distribution because of the provisions of Section 112 (b) (6) of the Revenue Act of 1936, 49 Stat. 648. The question in the pending case is whether the taxpayer is entitled, by reason of this liquidating distribution, to a dividends paid credit under Section 27 (f) of that Act, in the computation of the surtax on undistributed profits provided by Section 14 of that Act.

The facts as found by the Board of Tax Appeals are as follows: Credit Alliance Corporation, the taxpayer, was organized in July 1922 under the law of New York and dissolved in July 1937. During its existence it was actively engaged in business. In 1930 the Commercial Credit Company, a Delaware corporation, acquired more than 80% of the taxpayer's outstanding capital stock and by December 1, 1936, owned 526,238 shares out of 528,186 shares outstanding, or 99.63% thereof. Its holding continued the same until cancellation of all stock, which took place beginning in 1936. In that year liquidation of the taxpayer was decided upon, in order to simplify the corporate structure in accordance with Section 112 (b) (6), Revenue Act of 1936; and on December 1, 1936, the stockholders in special meeting, and later on the same day the directors, resolved to liquidate the corporation completely within three years, to distribute in liquidation property equivalent to $1.80 per share, to reduce the capital from $4,225,488 to $528,186, reducing the stated value of stock from $8 per share to $1 per share, and to distribute $7 per share in liquidation, all on December 10, 1936, to stockholders of record December 3, 1936. The resolutions were carried out,
70 and out of earned surplus there was distributed to the stockholders cash and property, all of the value of $950,734.80. Thereof the Commercial Credit Company received $947,228.40. The earned surplus account represented only earnings and profits accumulated since February 28, 1913; there was no paid-in surplus. On the same day the taxpayer, from assets made available by the reduction of capital from $4,225,488 to

$528,186, distributed cash and property all of the value of $3,697,302, of which the Commercial Credit Company received $3,683,666. Further distributions were made in 1937 and final disfribution was made and liquidation completed on November 30, 1938. Certification of dissolution had been filed in the office of the Secretary of State of New York on July 6, 1937, and the corporation legally dissolved on that date. The liquidation compiled with the provisions of Section 112 (b) (6) Revenue Act of 1936. The Commercial Credit Company did not distribute in 1936 to its stockholders any of the distribution received by it from the petitioner on December 10, 1936, and did not apportion or allocate any part thereof to the petitioner.

In its income tax return for 1936 the taxpayer claimed a dividends paid credit under Sections 14 and 27 of the Revenue Act of 1936 for the full amount of that year's distribution out of earnings and profits, that is, $950,734.80. The Commissioner allowed the credit to the extent of the amount distributed to minority stockholders, but disallowed it to the extent of $947,228.40, the amount distributed to the parent company. This resulted in the determination of a deficiency of $121,814.49 in taxpayer's undistributed profits tax for 1936. The taxpayer filed a petition for redetermination, and the Board of Tax Appeals held that there was no deficiency.

Section 14 (b) of the Revenue Act of 1936 imposes a surtax at graduated rates upon the undistributed profits of corporations. The tax is computed on such portions of the "undistributed net income" as are in excess of certain percentages of the "ad-
71 justed net income." The latter phrase is defined as "net income less normal income tax and certain specified credits." The phrase "undistributed net income" is defined as "the adjusted net income minus the sum of the dividends paid credit provided in Section 27," and another credit which has no bearing on this case.

We are concerned here with whether the earnings and profits distributed as aforesaid by the taxpayer to its parent corporation entitled the taxpayer to a dividends paid credit under the Act. Section 27 (a) defines the dividends paid credit as "the amount of dividends paid during the taxable year."

Section 27 (f) is a follows:

"(f) Distributions in Liquiation.—In the case of amounts distributed in liquidation the part of such distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purposes of computing the dividends paid credit under this section, be treated as a taxable dividend paid."

On its face this section seems to support the claim of the taxpayer to a dividends paid credit equal to the amount distributed. But the Commissioner contends that the section is not applicable for two main reasons: First, it is said that Section 27 (f) is modified and limited by Section 27 (h) to situations in which the distribution is taxable in the hands of the distributee, and since under the provisions of Section 112 (b) (6), no taxable gain was recognized upon the receipt by the parent corporation of the property distributed in the pending case, the taxpayer was not entitled to dividends paid credit for that distribution.

Section 27 (h) and Section 112 (b) (6) are as follows:

"(h) Nontaxable Distributions.—If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are
72 subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part:"

"Sec. 112. Recognition of Gain or Loss.

"(b) Exchanges Solely in Kind.—

* * * * *

"(6) Property Received by Corporation on Complete Liquidation of Another. No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. * * *"

The government contends that Section 27 (f) must be construed in harmony with the general purpose of the Act to reach undistributed profits of a corporation by taxing them in its hands unless they are voluntarily distributed to the shareholders and become income in their hands subject to taxation; and that when Section 27 (f) is so interpreted, it does not cover a tax-free distribution from one corporation to another which does not involve a distribution of earnings for tax purposes.

This contention of the Commissioner met with the approval of the majority of the court in Centennial Oil Co. v. Thomas, 5 Cir., 109 F. 2d 361; but it was pointed out in the dissenting opinion that if effect is given to all of the language of both subsections, it will be seen that Section 27 (h) does not modify or limit Section 27 (f). In both sections the term "dividends paid credit" occurs. Section 27 (f) expressly provides that a liquidating distribution of earnings or profits shall be "treated as a taxable dividend paid," and hence such a distribution cannot be treated as a nontaxable distribution as to which, under Section 27 (h), no dividends paid credit is allowed. In the pending case the Board of Tax Appeals followed the interpretation of

the dissenting opinion. The Board held that Section 27 (h) is the more general and Section 27 (f) the more specific provision, and that Section 27 (f) should therefore control in
73. the case of a liquidating distribution, under the canon of statutory interpretation approved in United States v. Chase, 135 U. S. 260 and Rodgers v. United States, 185 U. S. 83. Ordinarily a liquidating distribution is not considered a dividend; Hellmich v. Hellman, 276 U. S. 233; M. E. Blatt Co. v. United States, 305 U. S. 267; but, by virtue of Section 27 (f), a liquidating distribution is to be treated not as a dividend but as a taxable dividend.

Confining ourselves for the moment to a comparison of these sections of the Act, we find we are in accord with the Board's interpretation. It gives effect to the coordinate purpose of the Act manifested in this section and also in Section 112 (b) (6) to encourage the simplification of corporate structures by liquidation. The desirability of such a simplification of corporate structures was stressed in a message of the President to the Congress on June 19, 1935, H. R. Rep. No. 1681, 74th Cong., 1st Sess., p. 4; and it was emphasized in the debates in Congress during the passage of the Revenue Act of 1936 by Senator George for the Senate Finance Committee on the floor of the Senate, and by Representative Doughton for the Ways and Means Committee on the floor of the House. See 80 Congressional Record 8799, 10270; Seidman, Legislative History of Federal Income Tax Laws, pp. 242, 243. Moreover, as we shall see, the Board's interpretation of Section 27 (f) is not inconsistent with the Congressional intent to tax undistributed corporate profits.

The Commissioner in the pending case places special reliance on the second reason above referred to. His argument is that a liquidating distribution of profits by a subsidiary to a parent corporation does not amount to a distribution "which is properly chargeable to the earnings or profits accumulated after February 28, 1913," in the words of Section 27 (f), because the property in the hands of the distributee still retains its character as earnings or profits as distinguished from capital. In other words, no distribution of profits has taken place. If, as in this case, no such taxable gain is recognizable in the transac-
74 tion, it is of obvious advantage to the government to distinguish a distribution from one entity to another in the same corporate structure from a distribution by a corporation to individual stockholders whose receipt of the property would be subject to an income tax. The argument finds its basis in the rule laid down in Commissioner v. Sansome, 2 Cir., 60 F. 2d 931, that if an intercorporate transfer of earnings and profits results

in no recognition of profit or loss to the distributee corporation, they remain earnings or profits, and do not become capital in its hands. In other words, a distribution of earnings in a tax-free transfer by a subsidiary to a parent does not turn the earnings into capital. See, also, Murchison's Estate v. Commissioner, 5 Cir., 76 F. 2d 641; Baker v. Commissioner, 2 Cir., 80 F. 2d 813.

This principle, however, does not necessarily lead to the Commissioner's conclusion. It is obvious that Congress may have used the term "earnings or profits" in Section 27 (f) in its customary sense, so as to provide that a distribution thereof in liquidation, as distinguished from a distribution of capital, should give rise to a dividends paid credit, and at the same time have provided in Section 112 (b) (6) that no gain or loss should be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. Indeed these sections read together adhere to the principle of Commissioner v. Sansome, supra, for they recognize that the property distributed remains in substantially the same hands and that no actual gain or loss has been realized in the transaction. Furthermore, if this interpretation is given, an obstacle to the simplification of corporate structures desired by Congress is removed.

We think that the term "earnings or profits" was used in Section 27 (f) to exclude from its purview a distribution of capital. We are of opinion, also, that the treatment of the distribution in this case as a taxable dividend paid will not
75 conflict with the purpose of Congress to impose a surtax upon undistributed corporate profits. It is true that a distribution of the property will relieve the taxpayer, the subsidiary corporation, from the payment of an undistributed profits tax, and the receipt of the property by the parent corporation will not require the imposition of a tax upon it for a gain received; but it is not true that the distributee will be under no liability for an undistributed profits tax upon the profit received if it remains undistributed in its hands. The distributor, having distributed the property, is free from the undistributed profits tax; the distributee, having received that which in another capacity it already possessed, is not required to pay a tax upon its formal receipt; but there is nothing in the Act which says that the distributee is not subject to a tax upon undistributed profits if it persists in the retention of property which, in its hands as in the hands of the former holder, retains its character as undivided profits. This interpretation has the undoubted advantage, that it gives to Sections 27 (f) and 27 (h) their normal meaning, and at the same time gives effect to the underlying

purposes of the Act to tax undistributed corporate profits and also to facilitate and encourage the simplification of corporate structures.

Having reached this conclusion, we have no need to pursue throughout its tortuous length the entire argument advanced by the Commissioner to show that Section 27 (f) should not be given the meaning which its language would ordinarily convey. The Commissioner's argument refers also to Section 115 (h) of the Act, which provides that a distribution to a distributee by a corporation of its stock or securities, or stock or securities in another corporation, shall not be considered a distribution of corporate earnings or profits if no gain to the distributee from the receipt of such stock or securities was recognized by law. It is said that this section is an express legislative recognition of the
76 principle of Commissioner v. Sansome, supra, as indeed it is,* and hence a similar restriction, although not expressed, should be implied in Section 27 (f) so that only those liquidating distributions which give rise to taxable gains in the hands of the distributee should be treated as taxable dividends paid.

In answer to this argument it is sufficient to say that the government adds no strength to its position by pointing out that Section 115 (h) of the Act of 1936 also involves a recognition of the principle of the Sansome case already considered above. Whether the same result would be reached under Section 115 (h) of the Act of 1938, which adds tax-free distributions of "property or money" to the category of transactions not to be considered as distributions of earnings or profits, we have no occasion now to consider. The reference to the transfer or exchange of "property" in Article 115 (h) of Treasury Regulations 94, promulgated under the Revenue Act of 1936, was obviously unauthorized if it was intended as an enlargement of the scope of the corresponding section of the act.

The government also refers, without avail, to Article 27 (f) of Treasury Regulations 94, which, without legislative sanction, authorizes a distributee in liquidation to allocate or transfer a dividends paid credit earned by it under the Act to its distributor. Indeed this regulation serves to indicate that the Treasury's interpretation of Section 27 (f) imposes so unreasonable a burden on the distributor in liquidation that some affirmative action to alleviate the consequences, at least in part, was required.

Our conclusion is that the decision of the Board of Tax Appeals should be affirmed.

*See Report of Senate Finance Committee, S. R. No. 2156, 74th Cong., 2d Sess., p. 91; Seidman, Legislative History of Federal Income Tax Laws, p. 260.

78 In United States Circuit Court of Appeals, Fourth Circuit

No. 4801

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CREDIT ALLIANCE CORPORATION, RESPONDENT

On Petition to Review the Decision of the United States Board of Tax Appeals

Judgment

Filed and Entered July 21, 1941

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
U. S. Circuit Judge.
ARMISTEAD M. DOBIE,
U. S. Circuit Judge.
ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

August 21, 1941, the mandate of this Court, in this cause, is issued and transmitted to the United States Board of Tax
79 Appeals, at Washington, D. C., in due form.

80 [Clerk's Certificate to foregoing transcript omitted in printing.]

81 In Supreme Court of the United States

October Term, 1941

No. 708

Stipulation concerning printed record

Filed Jan. 24, 1942

Subject to this Court's approval, it is hereby stipulated and agreed between the attorneys for the respective parties hereto,

that for the consideration of this case on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted November 24, 1941, the printed record may be shortened by substituting this stipulation for the three exhibits to the stipulation of facts filed with the Board of Tax Appeals in this case.

Exhibit 1 consists of a notice dated November 19, 1936, of a special meeting of the stockholders of the Credit Alliance Corporation to be held December 1, 1936, to take action on a proposed plan of liquidation of the corporation; and of the minutes of the special meeting held in accordance with the notice.

Exhibit 2 is the income and excess profits tax return for the calendar year 1936 of the Commercial Credit Company. That return reveals the following computations of income and undistributed profits tax:

82 INCOME TAX COMPUTATION

NORMAL TAX

13. Net income for income tax computation (item 29, page 2)			$11,812,303.10
15. Dividends received credit (85 percent of item 12 (a), page 2) (this credit not allowed to mutual investment companies)			5,006,250.90
17. Normal-tax net income (item 13 minus items 14 and 15 or 14 and 16)			$6,806,043.20
18. Tax on portion of item 17 not in excess of $2,000	Portion of Item 17 $2,000.00	Rate 8%	$160.00
19. Tax on portion of item 17 in excess of $2,000 and not in excess of $15,000	13,000.00	11%	1,430.00
20. Tax on portion of item 17 in excess of $15,000 and not in excess of $40,000	25,000.00	13%	3,250.00
21. Tax on portion of item 17 in excess of $40,000	6,766,043.20	15%	1,014,906.48
22. Total normal tax (amount of tax in items 18 to 21, inclusive)			$1,019,746.48

SURTAX ON UNDISTRIBUTED PROFITS

(See Instruction 32 respecting corporations exempt from surtax)

23. Net income for surtax computation (item 29, page 2)			$11,812,303.10
24. Less: Normal tax (item 22, above)			1,019,746.48
28. Adjusted net income (item 23 minus items 24-27)			$10,792,556.62
29. Less: Dividends paid credit (see Instruction 35)			9,804,241.77
31. Undistributed net income (item 28 minus items 29 and 30)			$988,314.85
Brought forward			$1,019,746.48
34. Tax on portion of item 23 not in excess of 20% of item 28	Portion of Item 33 $988,314.85	Rate 7%	$69,182.04

35. Tax on portion of item 33 in excess of 10% and not in excess of 20% of item 28	Portion of item 17	Rate	
	----------	12%	
83 36. Tax on portion of item 33 in excess of 20% and not in excess of 40% of item 28	----------	17%	
37. Tax on portion of item 33 in excess of 40% and not in excess of 60% of item 28	----------	22%	
38. Tax on portion of item 33 in excess of 60% of item 28	----------	27%	
39. Amount of tax in items 34 to 38, inclusive, $69,182.04.			
41. Total surtax (item 39 plus item 40)			$69,182.04
42. Total normal tax and surtax (item 22 plus item 41)			$1,088,928.52

Exhibit 3 is the income and excess profits tax return for the calendar year 1936 of the Credit Alliance Corporation. That return reveals the following computations of income and undistributed profits tax:

INCOME TAX COMPUTATION

NORMAL TAX

13. Net income for income-tax computation (item 29, page 2)			$699,687.63
17. Normal-tax net income (item 13 minus items 14 and 15 or 14 and 16)			699,687.63
18. Tax on portion of item 17 not in excess of $2,000	Portion of item 33 $2,000.00	Rate 8%	$160.00
19. Tax on portion of item 17 in excess of $2,000 and not in excess of $15,000	13,000.00	11%	1,430.00
20. Tax on portion of item 17 in excess of $15,000 and not in excess of $40,000	25,000.00	13%	3,250.00
21. Tax on portion of item 17 in excess of $40,000	659,687.63	15%	98,953.14
22. Total normal tax (amount of tax in items 18 to 21, inclusive)			$103,793.14

SURTAX ON UNDISTRIBUTED PROFITS

(See Instruction 32 respecting corporations exempt from surtax)

23. Net income for surtax computation (item 29, page 2)	$699,687.63	
24. Less: Normal tax (item 22, above)	103,793.14	
84 Total normal income tax (item 22) brought forward		$103,793.14
28. Adjusted net income (item 23 minus items 24–27)	$595,894.49	
29. Less: Dividends paid credit (see Instruction 35)	950,734.80	
31. Undistributed net income (item 28 minus items 29 and 30)	None	
41. Total surtax (item 39 plus item 40)		None
42. Total normal tax and surtax (item 22 plus item 41)		$103,793.14

It is further agreed that in the briefs for either party reference may be made to any portions of the exhibits to the stipulation of facts which are omitted from the printed record in accordance with this stipulation.

CHARLES FAHY,
Charles Fahy,
Solicitor General of the United States.

Dated this 20 day of January, 1942.

CHRISTOPHER S. SARGENT,
Counsel for Respondent.

Dated this 23 day of January, 1942.

84½ [File endorsement omitted.]

85 Supreme Court of the United States

Order allowing certiorari

Filed November 24, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 46036. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 708. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Credit Alliance Corporation. Petition for a writ of certiorari and exhibit thereto. Filed October 21, 1941. Term No. 708 O. T. 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1942